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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/561,430	02/08/2007	Martin Schweizer	7865-262 MIS:jb	6351
24223 7590 12/21/2010 SIM & MCBURNEY 330 UNIVERSITY AVENUE 6TH FLOOR TORONTO, ON M5G 1R7 CANADA			EXAMINER WINSTON, RANDALL O	
			ART UNIT 1655	PAPER NUMBER
			MAIL DATE 12/21/2010	DELIVERY MODE PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

<b>Office Action Summary</b>	<b>Application No.</b> 10/561,430	<b>Applicant(s)</b> SCHWEIZER ET AL.	
	<b>Examiner</b> Randall Winston	<b>Art Unit</b> 1655	

**-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --**

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on 27 September 2010.
- 2a) ☒ This action is **FINAL**.                      2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 1-29 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☒ Claim(s) 27-29 is/are allowed.
- 6) ☒ Claim(s) 1-10 is/are rejected.
- 7) ☒ Claim(s) 11-26 is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All    b) ☐ Some \*    c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- |   |   |
|---|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892)                    | 4) <input type="checkbox"/> Interview Summary (PTO-413)           |
| 2) <input type="checkbox"/> Notice of Draftperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____                                      |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)         | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date _____   | 6) <input type="checkbox"/> Other: _____                          |

### **DETAILED ACTION**

Acknowledgement is made of receipt and entry of the response to the amendment filed on 09/27/2010.

The claimed objection set forth in the previous office action has been overcome.

The rejection made under the judicially created doctrine of obviousness-type double patent has been overcome by Applicant's Terminal Disclaimer.

The rejection made under 35 U.S.C. 102(e), set forth in the previous office action has been overcome.

Claims 1-4 and 8-29 have been examined on the merits.

### ***Claim Rejections - 35 USC § 112***

The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Claims 1-10 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to point out and distinctly claim the subject matter which applicant regards as the invention.

Claims 1 is rendered vague in indefinite by the phrase "forming a canola protein isolate having a protein content of at least about 90wt% (N x 6.26)." The phrase is unclear to the Examiner because Examiner can not determine how Applicant's claimed method steps result into a purified canola protein isolate having the claimed protein content utilizing only the claimed method steps of the claimed invention of claims 1-4 and 8-10, especially provided within independent claim 1. Therefore, although

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Applicant has included within claim 1 new claimed method limitations such as a specific temperature and time period to clearly define Applicant's claimed invention, it appears to Examiner that especially claim 1 is still missing some essential method steps to obtain a canola protein isolated having the claimed level of protein content. Clarification or Correction is required.

Claim 1 recites the limitation of "the intact canola oil seeds." There is insufficient antecedent basis for the limitation in the claim.

All other cited claims depend directly from the rejected claims and are, therefore, also rejected under 35 U.S.C. 112, second paragraph for the reasons set forth above.

### ***Claim Rejections - 35 USC § 103***

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 1-4 and 8-10 are rejected under 35 U.S.C. 103(a) as being unpatentable over Higgs et al. (US6,955,831) in view of Cisneros (US 6,808,621) for the same reasons set forth in the previous OFFICE ACTION which are restated below.

Applicant claims a method of forming a canola oil seed meal having a claimed protein content which comprises of heating the intact canola oil seed (i.e. intact meaning whole canola oil seed) at a specific temperature and time to deactivate enzymes therein, cooling the heat treated canola seeds, cracking the hulls and then dehulling of the heat treated canola oil seeds, wherein said heat treated and dehulled oil seeds are

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flaked prior to said oil removal step and wherein an over and an under fractions are separated from the cracked hulls and removing canola oil by solvent extraction from the heat treated and dehulled oil seeds to provide said canola oil seed meal wherein the canola oil seed meal is processed to recover therefrom a canola protein isolate having a protein content the claimed percentage.

Higgs teaches a method of forming a canola oil seed meal which comprises heating at a temperature range of about 100 °C to 115 °C and time period range of about 1.5 to 30 minutes (which reasonably reads upon heating at a temperature of approximately 90 °C and a time period range of about 5 to about 10 minutes, as instantly claimed) whole canola oil seed to deactivate enzymes therein, cracking the hulls (i.e. by mechanical treatment) and than dehulling of the heat treated canola oil seeds, wherein an over and an under fractions (i.e. the under fraction is subjected to air aspiration) are separated from the cracked hulls and removing canola oil by solvent extraction from the heat treated and dehulled oil seeds to provide said canola oil seed meal (see, e.g. entire article including abstract and claims).

Higgs, however, does not expressly teach cooling the heated canola seeds and wherein said heat treated and dehulled oil seeds are flaked prior to said oil removal step.

Cisneros beneficially teaches that seeds are flaked to facilitate oil removal (see, e.g. column 28 lines 22-37).

It would have been obvious to one of ordinary skill in the art at the time the invention was made to modify Higg's method of forming a canola oil seed meal to include Cisneros's teaching of the seeds are flaked to facilitate oil removal because the above combined two references as a whole would create the claimed invention's method of forming a canola protein isolate from the processed canola oil seed meal of and/or from a canola oil seed. The result-effective adjustment of conventional working conditions (e.g., cooling the heated treated canola oils seeds for better extraction, the substitution of one heating technique for another and the processing step of recovering an isolate with the claimed protein content) is deemed a matter of judicious selection and routine optimization which is well within the purview of the skilled artisan.

Accordingly, the invention as a whole is prima facie obvious to one of ordinary skill in the art at the time the invention was made, especially in the absence of evidence to the contrary.

Applicant arguments have been carefully considered but they are not deemed persuasive. Applicant argues Higgs's claimed method steps, especially having a different heating operation step than the claimed invention's heating step, result in a method of making a concentrate and not a canola protein isolate. However, as discussed above, Higgs teaches a method of forming a canola oil seed meal which comprises heating at a temperature range of about 100 °C to 115 °C and time period range of about 1.5 to 30 minutes (which reasonably reads upon heating at a temperature of approximately 90 °C and a time period range of about 5 to about 10

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minutes, as instantly claimed) whole canola oil seed to deactivate enzymes therein. In addition, it appears to Examiner that the claimed invention of claims 1-4 and 8-10, and especially of independent claim 1, is still missing some essential method steps to obtain a canola protein isolate having the claimed protein content (see, e.g. above 112 second paragraph rejection). Higg's claimed method comprising essentially of the same method steps as the claimed invention's method steps as well as to include the beneficial teachings of Cisneros would intrinsically obtain the same canola protein isolate upon utilizing the same claimed method steps. Therefore, Higgs and the combination of Cisneros read on all of the claimed invention's method steps of claim 1-4 and 8-10 as Examiner has stated above in his 35 USC 103(a) rejection.

Moreover, Applicant argues that Examiner uses the Cisneros reference apparently to show that seeds are flaked to facilitate oil removal. Examiner, however, still maintains that Examiner uses the Cisneros reference to remedy Higgs deficiency. Therefore, since Higgs does not teach that heat treated and dehulled oil seeds are flaked prior to said oil removal step and Cisneros beneficially teaches that seeds are flaked to facilitate oil removal, it would have been obvious to one of ordinary skill in the art at the time the invention was made to modify Higg's method of forming a canola oil seed meal to include Cisneros's teaching of the seeds are flaked to facilitate oil removal because the above combined two references as a whole would create the claimed invention's method of forming a canola protein isolate from the processed canola oil seed meal of and/or from a canola oil seed.

***Claim Objections***

Claim 11-26 are objected to as being dependent upon a rejected base claim, but would be allowable if rewritten in independent form including all of the limitations of the base claim and any intervening claims.

***Allowable Subject Matter***

Claims 27-29 are deemed allowable. The following is a statement of reasons for the indication of allowable subject matter: A method defined by claims 27-29 to form two different canola protein isolates having the claimed protein content via the recited steps is neither taught nor reasonably suggested by the prior art of record.

Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.



Any inquiry concerning this communication or earlier communications from the examiner should be directed to Randall Winston whose telephone number is 571-272-0972. The examiner can normally be reached on 8AM-5PM.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Terry McKelvey can be reached on 571-272-0775. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

RW

/Christopher R. Tate/  
Primary Examiner, Art Unit 1655

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